(2)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 25 1993

REPLY TO THE ATTENTION OF:
C-3T

MEMORANDUM

SUBJECT: Competing Claim of Jurisdiction in Mille Lacs Band of Chippewa's Application for Treatment as a State for Underground Injection Control Program

FROM: Gail C. Ginsberg
Regional Counsel

TO: Dale S. Bryson, Director
Water Division

The Office of Regional Counsel has completed its review of the competing claim of jurisdiction presented by the State of Minnesota regarding the Mille Lacs Band of Chippewa's application for treatment as a state under Section 300j-11 of the Safe Drinking Water Act.[1] After consultation with the Department of the Interior and the Office of General Counsel, we believe that the Band has sufficient authority over all lands and water resources within the exterior boundary of the reservation to qualify for treatment as a state for this program. For purposes of this determination, the reservation includes the original reservation as defined in the 1855 treaty between the United States and the Chippewa Indians, lands added to the reservation in 1934 under the Indian Reorganization Act, and lands held in trust by the United States for the Band in East and Central Minnesota. This determination is not intended for use for purposes other than the administration of U.S. EPA programs.

---

[1] The State of Minnesota initially raised a competing claim of jurisdiction in response to the Band's August 1989 application for a Lake Water Quality Assessment Grant under Section 314 of the Clean Water Act. At that time, ORC approved the application without issuing an opinion regarding the jurisdictional issue because implementation of the 314 grant, which was for a study only, would not adversely affect either the State's or Tribe's regulatory authority. The Band has now applied for two regulatory programs (the underground injection control and nonpoint source programs) that require resolution of the competing claim. This opinion addresses the underground injection control program; a subsequent opinion will address the nonpoint source program.

I. RELEVANT HISTORY OF RESERVATION

On February 22, 1855, the United States entered a treaty with the Mississippi, Pillager and Lake Winnibigoshish Bands of Chippewa Indians[2] ("1855 Treaty") whereby those Bands ceded lands owned and claimed by them in the Territory of Minnesota to the United States in exchange for a sufficient quantity of land reserved for their permanent homes and certain payments for settlement and improvement costs. Treaty with the Chippewa, 10 Stat. 1165 (1855). The reservation established for the band of the Mississippi Chippewa at Mille Lacs Lake under the 1855 Treaty is

> to embrace the following fractional townships, viz: forty-two north, of range twenty five west; forty-two north, of range twenty-six west; and forty-two and forty-three north, of range twenty-seven west; and, also, the three islands in the southern part of Mille Lac.

Id. at 1166. This area encompasses approximately 60,000 acres of land surrounding the southwestern third of Mille Lacs Lake, which, containing nearly 200 square miles of water and 86 miles of shoreline, is the third largest inland lake in Minnesota.

After some of the Mississippi Bands of Chippewa (not including the Mille Lacs Band) participated in an 1862 Sioux uprising, the United States entered a new treaty with the Chippewa in 1864 ("1864 Treaty") to further remove the offending bands from non-Indian settlements. Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, 13 Stat. 85 (1864). This treaty provides that

> The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagonin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the twenty-second of February, 1855, are hereby ceded to the United States

Id. at 85, but also that

> owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

---

[2] Currently recognized by the Bureau of Indian Affairs as the Mille Lac Band of the Minnesota Chippewa Tribe [51 Fed. Reg. 25,116 (1986)], the Band was referred to in the 1855 Treaty as one of the Mississippi bands of Chippewa. In this opinion, we use the name that the Band prefers: the Mille Lacs Band of Chippewa Indians. Both the Lake and Band have at times been referred to as "Mille Lac" and "Mille Lacs".

Id. at 87.

In the years following the 1864 Treaty, while the United States government was too occupied with the Civil War to protect the Mille Lacs reservation from intrusion, non-Indian settlers illegally logged portions of the valuable pine stands on the Mille Lacs reservation and began to settle and farm there.

To resolve some of the conflicts created by white society's expansion and as part of a national policy to promote the assimilation of American Indians into white society by allotting parcels of reservation lands to individual Indians, Congress enacted the Act of January 14, 1889, ch. 24, 25 Stat. 642, ("Nelson Act") whereby three Commissioners of Indian Affairs were to negotiate agreements with the Minnesota Chippewa Indians such that individual Chippewa or Chippewa families (except those from the Red Lake Reservation) would be allotted forty-acre parcels of land on either their own or the White Earth reservation. Lands not allotted to the Chippewa or otherwise set aside for their future use were available for public sale or homesteading, with the proceeds therefrom to be placed in a trust fund for the benefit of the Chippewa. Implementation of the Act would transfer tens of thousands of acres of prime forest land at values then estimated in the tens of millions of dollars from Indian to non-Indian control.

From October 2 through October 5, 1889, the three United States Commissioners negotiated with the Mille Lacs Band to accept the terms of the Nelson Act.

> (W)e found them (the Mille Lacs Chippewa) intelligent, cleanly, and well behaved. Their neighboring white settlers gave them a good name ... Their principal fault seems to be in possessing lands that the white man wants ... when we explained to them that this (agreement) was ... not like an ordinary treaty - that they had lost no rights under the old treaties ... they yielded and signed.

H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. 165 (1889). Based upon Commissioner Rice's manifestation that

> acceptance of this act will not affect these old matters (reservation boundaries) at all, or weaken your chances of obtaining hereafter your dues, but, on the contrary, leaves you in a stronger position than before

Id. at 165, the Mille Lacs Band entered an agreement

> forever relinquish(ing) to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864.

Signature Rolls, Mississippi Chippewa Indians, Mille Lac Bands, October 5, 1889, Id. at 46.

II. TREATMENT AS STATE APPLICATION

On April 3 and 18, 1989, the Mille Lacs Band of Chippewa Indians submitted letters of general interest in all U.S. EPA-delegated regulatory programs, asserting the Band's jurisdiction over four geographic areas: 1) lands within the boundaries established by the 1855 treaty between the United States and the Mississippi Bands of Chippewa; 2) lands added to the reservation in 1934 under the Indian Reorganization Act; 3) lands held in trust by the United States for the Band in East and Central Minnesota; and, 4) other lands later designated by the Band's Commissioner of Natural Resources.

On April 28, 1989, the Band submitted to U.S. EPA an application for a Lake Water Quality Assessment (Clean Lakes) grant under Section 314 of the Clean Water Act, 33 U.S.C. § 1324, to develop an assessment of lake water quality for three lakes: Mille Lacs, Ogechie and Stevens Lakes. The application asserts that Ogechie Lake lies within the 1855 Mille Lacs Reservation, whereas Stevens Lake lies totally within lands held in trust for the Band by the United States. The Band also contends that Mille Lacs Lake lies partially within the 1855 reservation boundaries.

The Band amended its application on May 17, 1989, to include a series of maps which identify the areas over which the Band Government would exercise environmental regulatory jurisdiction.

Pursuant to 40 C.F.R. § 130.15(b), the Region provided the State of Minnesota with an opportunity to comment on the Band's assertion that the functions to be exercised by the Band pertain to the management and protection of water resources which are: held by the Band, or by the United States in trust for the Band; held by a member of the Band and subject to a trust restriction on alienation; or otherwise within the borders of the Mille Lacs reservation. The Region also solicited the State's comments on the Band's informal request to be treated as a State under Section 1451 of the Safe Drinking Water Act for the same geographic areas covered in the Clean Lakes grant application, though the Band had not yet submitted an application for any program under the Safe Drinking Water Act nor a written request for such treatment.[3]

---

[3] Under the Public Water System and Underground Injection Control Programs, the U.S. EPA determines whether a Tribe is eligible for treatment as a State prior to accepting applications for specific programs or grants. Procedures for Tribal

In response to the Minnesota Pollution Control Agency's request for clarification regarding the application, the Band submitted additional maps and a copy of relevant provisions of the 1855 Treaty on August 10, 1989.

On September 12, 1989, the MPCA submitted formal comments to the application package. The MPCA contends that both an 1864 Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands and the Nelson Act of January 14, 1889 effectively cede the Mille Lacs reservation established in 1855 to the United States. The 1864 Treaty provides for the removal of certain Chippewa from their lands, while the Nelson Act provides for the sale of all reservation lands not allotted to individual American Indians. The MPCA argues that the present reservation includes only the current trust lands and not lands once within the 1855 reservation boundaries which were subsequently allotted to non-members. According to the MPCA, the 1855 Treaty did not include any of Mille Lacs Lake within the reservation boundaries, but only provided the Band fractional townships on the southern edge of the lake. The State has no objections to the Band's request for treatment as a State regarding the land added under the 1934 Indian Reorganization Act or the "off-reservation" trust lands. The State reserves comments on future lands designated by the Commissioner until the time of such designation.

On September 26, 1989, the MPCA objected to the Band's assertion of jurisdiction over Stevens Lake, claiming that the lake lies outside the reservation boundaries. On September 27, 1989, the Band corrected its application to identify Benjamin Lake, not Stevens Lake, as the third lake over which the Band has jurisdiction. The MPCA does not object to the Band's jurisdiction over Benjamin Lake, which lies entirely within trust lands.

By letter of its attorneys, the Band responded to the MPCA's September 12 comments on October 19, 1989. The Band maintains that portions of Mille Lacs Lake lie within the boundaries of the reservation, because, at the time of negotiating the treaty, the Band understood that the reservation would include this focal point of its subsistence lifestyle. The Band cites the established cannon of construction that Indian treaties should be interpreted as the Indians understood them. Also, the inclusion of three islands in Mille Lacs Lake in the 1855 Treaty reservation boundaries may, by implication, encompass portions of the lake itself. The Band further contends that neither the 1864 Treaty nor the Nelson Act cedes portions of the reservation established in 1855: the 1864 Treaty affected other Chippewa

---

participation in these programs are set forth at 40 C.F.R. Parts 35, 124, 141-146.

reservations, but not the Mille Lacs reservation; whereas the Nelson Act does not contain the express Congressional intent necessary to diminish reservation boundaries. The Band cites as support three federal district courts cases construing the Nelson Act.

On November 22, 1989, the State of Minnesota submitted additional comments to rebut the Band's comments of October 19. The State argues that, although the Band may have retained a right to fish in waters adjacent to the reservation, such right does not make Mille Lacs Lake a part of the reservation. The State further contends that although the 1864 Treaty allows the Mille Lacs Band to continue residing in the area, it explicitly cedes the Mille Lacs reservation to the United States. According to the State, settlement of the area and compensation to the Band under the Nelson Act resolve any question about disestablishment of the reservation, and the judicial decisions regarding the Nelson Act are distinguishable. Lastly, the State claims that the Band does not have environmental regulatory jurisdiction over non-Indians, even within the reservation boundaries, based upon analysis of the Montana and Brendale Supreme Court opinions.

At a November 30, 1989, meeting with the MPCA and the Region, the Band submitted a November 27, 1989, letter from Roger T. Aitken, Superintendent of the Minnesota Agency of the Bureau of Indian Affairs, which seemingly agrees with the Band's position that the current boundaries of the Mille Lacs reservation are the same as those established in the 1855 Treaty.

On December 21, 1992, the Band applied for treatment as a State to receive funding under the underground injection control program. The Band has developed UIC regulations and intends to apply for UIC primacy in the future.

III. COMPETING CLAIM OF JURISDICTION

As set forth above, the State of Minnesota does not contest the Band's jurisdiction over the lands added to the reservation in 1934 under the Indian Reorganization Act nor the lands held in trust by the United States for the Band in East and Central Minnesota. The State understandably cannot agree with or contest an assertion of jurisdiction by the Mille Lacs Band regarding other lands later designated by the Band's Commissioner of Natural Resources. Similarly, the Region cannot approve the Band for treatment as a state for such lands. Thus, only two areas of contention remain regarding the Band's claim of jurisdiction: 1) the inclusion of portions of Mille Lacs Lake within the reservation boundaries established by the 1855 Treaty; and 2) whether the 1855 reservation boundaries have been diminished by subsequent treaties or Acts of Congress. The inclusion of portions of Mille Lacs Lake within the reservation is not relevant to the UIC program. ORC has requested information from

the Department of Interior regarding this issue and will address it in a future memorandum regarding the nonpoint source program.

IV. STATUS OF 1855 TREATY BOUNDARIES

The U.S. Department of the Interior has taken the position that "Given the judicial standards governing analysis of boundary issues, we are of the opinion that the Mille Lacs Reservation boundaries encompass the territory described in the Treaty of 1855." Letter of Mark A. Anderson, Office of the Solicitor, U.S. Department of the Interior, to Mr. Earl J. Barlow, Minneapolis Area Director, Bureau of Indian Affairs (February 28, 1991). The Office of Regional Counsel recognizes the Department of the Interior's special expertise in American Indian boundary issues and agrees with its conclusions in this matter.

The Treaty of 1864. The Treaty of 1864 cannot be construed to have diminished or disestablished the reservation. Under the terms of that treaty, the Chippewa ceded the Mille Lacs and other reservations to the United States but were not compelled to remove from the land. This cession of the reservation to the United States with a retained right of occupancy by the Band in effect put the reservation lands in trust for the Band without altering the reservation boundaries. Thus, the plain language of the treaty does not support diminishment.

Also, given the superior bargaining position of the United States while negotiating treaties with American Indian tribes and the fact that such treaties were negotiated in a language foreign to the tribes, the Supreme Court has

> often held that treaties with the Indians must be interpreted as they would have understood them [citations omitted] and any doubtful expressions in them should be resolved in the Indians' favor.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). According to testimony presented by members of the Chippewa Delegation of Mille Lac before the Department of the Interior on July 21, 1897, the Mille Lacs Band construed the 1864 Treaty and statements made by the United States representatives who negotiated the 1864 Treaty to mean that "the Mille Lac Reservation would continue to remain Indian lands, and be occupied by the Mille Lac bands of Chippewa Indians" and "every right guaranteed to these bands in relation to the reservation under the provisions of the treaty of February 22, 1855, ... remained undisturbed." Report of the United States Chippewa Commission, St. Paul, Minnesota, December 26, 1889, H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. 22 (1890).

The Nelson Act. On October 5, 1889, by agreement with the United States entered pursuant to the Nelson Act, the Mille Lacs Band relinquished its right of occupancy on the reservation in exchange for specific allotments of land to be held in fee by individual members of the Band. Land not allotted to Indians would become available to non-Indians as "surplus." The Supreme Court has set forth

> a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within reservation boundaries ... Diminishment ... will not be lightly inferred. [This] analysis of surplus land Acts requires that Congress clearly evince an "intent ... to change ... boundaries" ... When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Solem v. Bartlett, 465 U.S. 463, 470, 472 (1984). See also Pittsburgh & Midway Coal Mining Company v. Yazzie, 909 F.2d 1387 (10th Cir. 1990).

The terms of the October 5, 1889 agreement do not explicitly change the boundaries of the reservation. In fact, a report by the United States delegation for that agreement and two subsequent Acts of Congress demonstrate that the reservation had not been diminished. In December 1889, the United States negotiators reported that

> The Interior Department now holds that - The Mille Lac Indians have never forfeited their right of occupancy and still reside on the reservation.

Report of the United States Chippewa Commission, St. Paul, Minnesota, December 26, 1889, H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. 22 (1890). By the Act of July 22, 1890, Congress granted to the Little Falls, Mille Lacs, and Lake Superior Railway Company

> the right of way for the construction of a railroad through the Mille Lacs Indian Reservation ... (and) the right to take and use three hundred and twenty of the lands in said reservation ... on the shore of Mille Lacs Lake, ... but no right of any kind shall vest in said railway company ... until the compensation aforesaid (both to the Band and to the United States for the use of the Band) shall have been fixed and paid and the consent of the Indians on said reservation to said right of way and as to the amount of

> said compensation shall have first been obtained ... Provided, That said railroad shall be located, constructed, and operated with due regard to the rights of the Indians ... Provided, That no part of the lands ... shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railway, telegraph, and telephone lines, and when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.

26 Stat. 290, 291. This Act refers to the reservation and rights of the Chippewa as still in existence, requires the approval and compensation of the Band, and requires reversion of the conveyed land to the Band when no longer used for the designated purposes. Similarly, the Act of May 27, 1902, which concerned appropriations for the Indian Department, authorized "payment to the Indians occupying the Mille Lac Indian Reservation" in effort to persuade the Indians to relocate. 32 Stat. 245, 268.

Before Solem v. Bartlett, the United States District Court for the District of Minnesota considered the effect of agreements negotiated under the Nelson Act on lands within the reservations of three other Bands of Minnesota Chippewa: the White Earth, Red Lake and Leech Lake Bands. In all three cases, the Bands had agreed to "grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all" of the lands at issue. In Leech Lake Band of Chippewa v. Herbst, 334 F. Supp. 1001 (1971), the Court found that

> It is apparent in the light of events before and after the passage of the Nelson Act that its purpose was not to terminate the (Leech Lake) reservation ... but rather to permit the sale of certain of his lands to homesteaders and others.

Id. at 1004, 1005. The Court based its reasoning upon three facts: 1) the Nelson Act allowed members of the Leech Lake reservation to accept their allotments on that reservation rather than relocate; 2) Congress did not use express language of termination in the Act; and 3) Acts subsequent to the Nelson Act dealt directly with the Leech Lake reservation as such.

In United States v. State of Minnesota, 466 F. Supp. 1382 (1979), and White Earth Band of Indians v. Alexander, 527 F. Supp. 527 (1981), the Court found that the Red Lake and White Earth reservations were diminished by the Nelson Act. Unlike members of the Leech Lake Band, members of the Red Lake and White Earth Bands did not have the option of taking allotments on those parts of their reservations ceded by the Nelson Act and consequent agreements. The Court also determined that the express language

of the Nelson Act and its legislative history did extinguish all property rights in the ceded lands and that subsequent construction of the enactments and agreements did not provide the Red Lake or White Earth Bands any rights in the ceded areas.

The circumstances regarding the cession of the Mille Lacs lands resemble those of the Leech Lake case. The Nelson Act allows members of the Mille Lacs Band to choose allotments within the reservation, and, as set forth above, subsequent Acts of Congress recognize that the Mille Lacs Chippewa retained some rights to the ceded lands. Also, the language of the agreement between the United States and the Mille Lacs Band negotiated pursuant to the Nelson Act is even less of an express diminishment regarding the reservation than the language negotiated for the three other Bands. Whereas the White Earth, Red Lake and Leech Lake agreed to "grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all" the ceded lands, the Mille Lacs Band agreed only to "relinquish to the United States the right of occupancy" on the Mille Lacs Reservation. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 46 (1889). In that same agreement, the Mille Lacs Band did agree to "grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all" lands it held *outside* the reservation but not in and to lands held *within* the reservation boundaries. The reference to relinquishing only the right of occupancy on the reservation therefore cannot be read as express language of diminishment, especially in light of the standards established in Solem v. Bartlett.

For these reasons, we agree with the Department of the Interior's conclusion that the reservation boundaries established by the 1855 treaty remain undiminished by the Treaty of 1864 or the Nelson Act and consequent agreement.

V. JURISDICTION OVER NON-INDIANS WITHIN RESERVATION

The State of Minnesota also questions the Band's authority to regulate non-Indians on lands held in fee by non-Indians within the exterior boundaries of the reservation. In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court set forth

> the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of a tribe.

Id. at 565, 566. The Court then set forth two exceptions to that rule, one of which provides that

> a tribe may ... retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands

> within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe

Id. at 566. The Court has followed this rule in two subsequent cases: Brendale v. Confederated Bands and Tribes of the Yakima Nation, 492 U.S. 408 (1989) and South Dakota v. Bourland, No. 91-2051 (June 14, 1993).

In the preamble to its Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations; Final Rule, the U.S. EPA discusses the application of the Montana rule as affected by Brendale to the implementation of tribal programs approved by the Agency. 56 Fed. Reg. 64,876 (December 12, 1991). Before approving a tribal program that includes the regulation of non-Indians within a reservation, the Agency requires a showing that

> the potential impacts of regulated activities on the tribe are serious and substantial ... [However] the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule

Id. at 64,878.

On August 6, 1993, the Band provided Region 5 with a showing that the use of underground injection wells by non-Indians within the reservation would have a serious and substantial impact on the health of Band members through potential contamination of drinking water, fish and other resources. Based upon this showing and the Agency's interpretation of the case law governing regulation of non-Indians within reservation boundaries, we believe that the Mille Lacs Band has authority to regulate the underground injection activities of both Indians and non-Indians within the reservation.

VI. CONCLUSION

For the reasons set forth above, the Office of Regional Counsel believes that the Mille Lacs Band has sufficient authority over all lands and water resources within the external boundaries of

the reservation to qualify for treatment as a state for the underground injection control program. If you have any questions or comment in this matter, please contact Marc Radell, Associate Regional Counsel, at 886-7948. Most of the documents referred to in this memorandum are contained in the files of th Water Division. If you would like additional copies of a[illegible] of them or copies of any of the court opinions cited, please contact Marc at the number above.

cc: Kestutis Ambutas, ME-19J
Claudia Johnson-Schultz, W-15J
Charles Anderson, WD-17J